Supreme Court, U.S.
FILED

97 1600 MAR 20 1998

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No._____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1998

MONIKA F. BAYER,
Petitioner

vs.

STANFORD UNIVERSITY SCHOOL OF MEDICINE/ MEDICAL CENTER; STANFORD UNIVERSITY; I. ROSS MCDOUGALL and GARY M. GLAZER;
Respondents

_____/

On Petition for a Writ of Certiorari to the Court of Appeal, State of California, Sixth Appellate District

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PETITION FOR WRIT OF CERTIORARI

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54 pp

QUESTIONS PRESENTED

1. Whether directly contrary enforcement of public policy protecting the public health by two arms of the state government violated *Due Process of Law* of the Fourteenth Amendment.

a) Where citations and strict orders by the California Department of Health Services that plaintiff comply with the 'state policy', her compliance with these orders and refusal of job terms contrary to the 'state policy' triggered the injuries to property, liberty and life.

b)Yet where the state court system refused to enforce, at all, that very same 'state policy', which controlled plaintiff's claims, and decided plaintiff shall take nothing by her complaint.

2. Was plaintiff deprived of protected property interests, that is, causes of action entitling her to relief for the wrongful loss of her job, her career and the loss of or injury to her husband's life, in violation of the *Due Process Clause* of the Fourteenth Amendment, when the state court forged a "Settlement" agreement, and entered it as a party for the purpose to enforce it, but then refused a single hearing with a standard of review either adequate to actually enforce, or to comply with, its terms?

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BASIS OF JURISDICTION

Petitioner, Monika F. Bayer, prays that the Supreme Court grant a Writ of Certiorari to review the judgment affirmed by the Court of Appeal of the State of California, Sixth Appellate District, filed June 16, 1997. (App., infra, page 1a) It is not reported.

A timely application for rehearing filed June 30, 1997 was denied. (App., infra, page 18a)

A Petition for Review in the California Supreme Court timely filed on July 25 was denied September 17, 1997. (App, infra, pages 19a, 20a)

A Petition for Writ of Review on the grounds that the judgment exceeded jurisdiction (Cal. Code Civ. Proc., Sec.1069 and Rule 56, Rules of Court) was filed timely within 60 days in the California Supreme Court on November 17. It was denied on December 23, 1997. (App., infra, page 21a).

The judgment by the Court of Appeal is the final judgment of the "highest court of the State in which a decision could be had".

The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1257 (3).

CONSTITUTIONAL PROVISON INVOLVED

The constitutional provision involved is the *Due Process of Law* Clause of the Fourteenth Amendment to the United States Constitution, which provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; **nor shall any State deprive any person of life, liberty, or property, without due process of law;** nor deny to any person within its jurisdiction the equal protection of the laws.

II. STATEMENT OF THE CASE

Facts. The key facts concerning the violations of public policy are documented, declared true under penalty of perjury and on record. References are to Appellant's Appendix on appeal. ('AA')

Petitioner/ plaintiff, Monika F. Bayer, was employed by Stanford University in the School of Medicine for about 15 years. She, like other Ph.D. scientists, was not licensed for, and under Stanford policy not intended to do, any clinical work. (AA 77) Yet, her superior, Dr. I. Ross McDougall, delegated to her the supervision and most of his director's responsibilities for the Stanford "RIA" or "Thyroid Assay" Clinical Laboratory. (AA 150:23-25)

This action was triggered by an audit by the California Department of Health Services ('DHS') on October 18 of 1990. DHS cited Stanford for several violations, including Citation #1 under 17 Cal. Code Regs. 1050 (c) (2)[1]: "The laboratory director did not personally determine and monitor the quality control program in the laboratory. These duties were being performed by a person [plaintiff] who is not authorized to function in this capacity by California regulations."(AA 132-137, at 133).

Ms. Ellis, a DHS examiner, strictly ordered plaintiff to comply with the "Laws Relating to Clinical Laboratories" and to stop performing the laboratory director's responsibilities, illegal for anyone except him. Otherwise, she could go to jail.(AA 78:1-5)

When plaintiff, in compliance with DHS orders, asked to be released from the illegal job terms, Stanford retaliated by a demotion, giving her a "Job Description for Operations Manager" and eliminated, without cause, her Senior Research Scientist position. (AA 153, para.4; and 126 last para.)

This job description of October 30, 1990 specifically made her "responsible for the operations of the thyroid assay laboratory", for "assuring the overall quality of the laboratory services, their accuracy", "supervising the staff of the laboratory". (AA

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1 All references to statutes herein refer to California Codes, unless stated otherwise.

146-148; 66:15-21; 159-166). These were the very responsibilities declared illegal for her by DHS,supra.

Information from DHS and the laws provided by that agency (AA 83-122, see page (i), supra) indicated that this job description was literally contrary to Cal. Bus. & Prof. Code Sec.1209 (Responsibilities of the Clinical Laboratory Director) (AA 86), Sec. 1284 (Unlawful to serve only as nominal director) (AA 99) and 17 Cal. Code Regs. Sec. 1050(c)(2) (Person directing lab must determine and monitor QC programs) (AA 114). Most material, it required plaintiff to act, on a daily basis, as laboratory director, and as a licensed person in violation of Cal. Bus. & Prof. Code Sec. 1280 (Acting as licensed person without a license) (AA 98).

Some four years later, when under oath, Stanford admitted that this job description was "illegal". (AA 78:16-20) No inferences are required to so hold.

In November of 1990, Stanford also gave plaintiff written orders to perform manual clinical laboratory tests involving quantitative measurement of FT4 ("FT4 tests") and T3 ("T3 tests") in patients' specimens for clinical, diagnostic purposes. (AA 138 and 167, 78:21 -80:5).

Plaintiff requested a note of legal authority that she could perform the tests without breaking the law, because Cal. Bus. & Prof. Code Sec.1282 (Unlawful to make test unless duly licensed; AA 98) and 17 Cal. Code Regs. Sec. 1034.1(a) (Licensed personnel must perform quantitative tests; (AA 108) literally prohibited her from doing so. (AA 139 and 168). Stanford claimed to have such documentation but refused to show it to her or her late husband, holding she had to follow work orders. (AA 79:23-27).

Because of DHS guidelines, related citations by the agency and the instructions plaintiff obtained from DHS, i.e, that Sec.1034.1(a), supra, did apply, (AA 79:21-22), which was later confirmed by a second DHS examiner (AA181:16-22), she did not perform the tests.

Stanford falsely accused her of insubordination, punished and humiliated her by two suspensions, (AA 140, 139, 167, 80:2-5), stopped her salary and threatened with "termination for insub-

ordination". (AA 142, 183-185, at 185). It never identify a specific statute, and failed to produce any document(s) in discovery to show that these suspensions were proper under the circumstances.

Plaintiff filed a formal grievance (AA 123 -148) with the Dean of the Stanford School of Medicine informing him and others, e.g., as follows:

> "The new job description ..would force me to violate State of California Laws regulating Clinical Laboratories". (AA 127 at end). "I was instructed by .... to perform a clinical laboratory procedure, which the attached exhibits indicated to me was probably illegal". (at 123, para.1.) "I do not think it is possible for me to return to work.... until we have explored ways to resolve these matters." (at 124, para. 4) "Failing your favorable review of this request, I am afraid I may have no other option but to consider my employment terminated by Stanford University, because of the circumstances described in this letter." (at 124, para 5).

Stanford failed to respond in any substantive manner to this grievance for more than eight months and caused plaintiff's constructive termination in violation of public policy by offering no alternatives, no salary, only the illegal job plus other illegal orders, which coerced her to commit violations of Bus. & Prof. Code Secs. 1280 and 1282, violations which under Sec. 1287, id., (AA 99), were subject to criminal prosecution.

In other words, there was no way plaintiff could comply with the orders by DHS and the letter of the law and accept this illegal job. Not to mention the whole ordeal. Eventually, when Stanford refused to remedy the situation for many months, she had absolutely no choice but to consider her employment terminated. (AA 124, para.4; 80:6-17). She did not even have a job to resign from. On July 18, 1991, she filed for unemployment insurance benefits (AA 186-189 and 80:16-28). Had plaintiff accepted the job and orders to perform tests, she would have become criminally liable and could have been imprisoned. (AA 78: 24-28; 80:7-9.).

When Stanford was required by the state to respond to the unemployment insurance claim, Dr. Gary M. Glazer, the department chair, provided a grievance disposition dated August 5, 1991 denying any illegal or wrongful conduct. (AA 190 -196, see at 194: last para; at 196: para.1; at 195: para.5 and 6: " Dr. Bayer's suspensions for refusal to perform a work direction were appropriate and consistent with University disciplinary policies.").

In addition, Stanford went through the motions of executing a so called "layoff" effective August 16, 1991. (AA 196 last para; 81:1-9).

At that time[2], there was absolutely no justification or rational ground for this "layoff" except to cover up illegal conduct. Both, as a matter of law, and physically it was impossible to "lay off" plaintiff from her former position, which Stanford had already eliminated without cause, and in breach of contract, when it demoted her to the illegal job, some nine months earlier, or when she had already been forced out and was "unemployed".

Under Stanford policy and plaintiff's (implied) contract for a "continuing Senior Research Scientist/ Associate appointment", a layoff for "programmatic reasons" was justified only "if the research direction changed in a manner not commensurate with her skills or interests".

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[2] Stanford did not respond to plaintiff 's request in January 1991, when she suggested as "immediate option a layoff, unless or until a faculty position could be developed, or unless and until she was properly reinstated", because she was being forced out in a manner that precluded reemployment and destroyed her career. This "layoff " did nothing to rescue her career. (AA 81:5-8) Contrary to the findings made, plaintiff did not "thank the grievance committee for complying with her wishes in laying her off.", nor did she accept this non legitimate "layoff" . She accepted a check for money to which she was more than entitled for the wrongful elimination of her former position and appealed the grievance disposition, but to no avail.

Stanford retroactively alleged a change in research direction two years earlier, in 1989. (AA 196: para.4.) but there is absolutely no evidence on record, or anywhere, to show that plaintiff's skills or interests were not up to the allegedly changed research in order to justify this so called "layoff", even if the research had changed, and even if the demotion to the illegal job had not preceded it.

For no other reason than that plaintiff complied with explicit orders by the California Department of Health Services and the letter of fundamental public policy protecting the public health (to retain her personal freedom), and as a result of Stanford's wrongful acts when she complied with the law, plaintiff suffered the loss of her job, the loss of her career and the loss of or injury to her husband's life. There has been no hearing of evidence on injuries and damages because Stanford insisted on a bifurcated proceeding.

Causes of Action, Constitutionally Protected Interests

The lawsuit claimed primarily (1) "Wrongful termination of employment due to violation of public policy" (2) Breach of contract (3) Breach of the covenant of good faith and fair dealing.

These claims were based on (1) California Labor Code Sec. 2856 (employee not required to comply with "unlawful" orders), and Sec. 2922 (employer's right to discharge limited by public policy). Applicable precedents hold employers legally liable for terminating an employee by coercion to commit criminal acts and award tort relief (Tameny v. Atlantic Richfield Co.,[1980] 27 Cal.3d 167; Garcia v. Rockwell Int. Co. [1986] 187 Cal. App.3d 1556 et al.)

(2) Plaintiff's (implied) contract for a "continuing appointment as Senior Research Associate/ Scientist pursuant to Stanford policy could only be terminated for cause or under very specific circumstances by a layoff, as noted above on page 5.

These legally enforceable entitlements to relief for injuries involving her job, career and her husband's life shared the characteristics of a property protected by the Due Process Clause of the

Fourteenth Amendment. (Mullane v. Central Hanover Bank & Trust Co., 339 US 306, 94 L Ed 865, 70 S Ct 652. [3], Logan v. Zimmerman Brush Co. 455 US 422, 71 Led 2d 265, 102 S Ct 1148).

A subsidiary question is whether they also included a protected liberty interest[4]

The court-brokered "Settlement"/ arbitration agreement and the court's contractual obligation to enforce it.

The judge with jurisdiction over the case required the parties to attend a pre-trial "settlement conference". Using his authority under California law, the court was instrumental in creating the "Confidential Settlement" and played a major role in persuading the parties to submit to binding arbitration under specified terms, rather than proceed to a jury trial. (CT, AA 36-43).

Also, in sharp contrast to voluntary private arbitration agreements, the court entered this agreement and became a party to it, specifically for the purpose to enforce it. (AA 40:13-15, 42:9-11)

Key for plaintiff's consent to the arbitration was her understanding and reliance upon, that thereby the court (expressly) assumed a contractual obligation to fairly enforce it in accordance with its terms and California law, and that the court was bound to honor this obligation.

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[3] "Under the due process clause of the Fourteenth Amendment, the hallmark of property is an individual entitlement grounded in state law, which cannot be removed except for cause; once that characteristic is found, the types of interests protected as property are varied..."

[4] An employee's liberty under Labor Code Sec. 2856, i.e., not to have to obey unlawful employer's orders, which could lead to incarceration, and not to have to choose between losing one's freedom and losing one's professional life (due to the employer's retaliatory acts) coincides with, and affirms, fundamental rights that are within the concept of constitutional liberty and thus should be subject to *substantive due process* protection by the courts.

The "Settlement terms" for the Arbitration

(i) The arbitrator was required to apply the rules of evidence, (ii) to render a decision on "legal liability" in adherence to the rule of law, and (iii) Code Civ. Proc., Sec.1280 et seq., the California Arbitration Laws were applicable.

The Arbitration Award manifestly did not comply with the 'Settlement' and was fatally prejudicial

The award, which declared Stanford not legally liable, (App., infra 8a -14a; AA 50-57), was challenged as suppressing Stanford's admission of illegality, as illegal and contrary to the substantive statutory public policies governing the case, as lacking essential findings, and as not supported by substantial, competent evidence.

1. More specifically plaintiff petitioned the courts to vacate this award under the arbitration laws, which were part of the "Settlement", i.e., Code Civ. Proc., 1286.2 subdiv.(d), (the arbitrator acted in excess of power), on the following several grounds:

a) The arbitrator was to follow the rules of evidence, yet the arbitrator's "Facts" show, e.g., that Stanford's admission that the job description given to plaintiff was illegal was omitted. This admission of illegality was made by Stanford under oath before the arbitrator (AA 78:16-20). It was plaintiff's most crucial evidence to prove the wrongful termination and to rule out any legitimate layoff.

b) The arbitrator, who was to render a ruling on "legal liability" in compliance with the law, stated an "Analysis" which clearly shows that not a single provision of the controlling fundamental public policy for health, i.e., of Bus. & Prof. Code Secs. 1209, 1280, 1282, 1284, etc., was actually applied, the very provisions plaintiff asserted that Stanford violated and coerced her to violate.

The award condoned conduct by Stanford, which admittedly was illegal, and/or was cited by DHS as illegal, and/or was

evidenced by the documents as literally contrary to above provisions, conduct which is expressly condemned by Sec.1287, id., as criminal offenses, as noted above on pages 2-5.

c.) The award condoned job terms and orders which clearly coerced plaintiff to violate Secs. 1280 and 1282. This, in turn, abrogated plaintiff's statutory rights under the Labor Code Secs. 2856 and 2922 and her rights under Tameny v. Atlantic Richfield Co., and Garcia v. Rockwell Int. Co., supra, which hold the employer liable for a wrongful termination by coercion to commit criminal acts.

2. In addition, plaintiff petitioned the court to vacate the award under Code Civ. Proc., Sec. 1286.2 subdiv. (e) and Sec. 1283.4, , because it fatally prejudiced plaintiff by failing to make essential findings. (Zaninovich, Inc. v. Teamster Farmworker Local Union 946 (1978) 86 Cal. App. 3d 410, Muldrow v. Norris (1859) 12 Cal. 331; Cothron v. Interinsurance (1980) 103 Cal. App.3d 853).

Most importantly, the arbitrator's findings that plaintiff was "not fired", was "laid off", and that Stanford was not legally liable cannot be accurate without the necessary findings on the issues of illegality.

The award, on its face proves that the arbitrator failed to make the key findings as to whether the job description for "Operations Manager" and other written orders given to plaintiff, were lawful, or amounted to directives to commit criminal acts in violation of Bus. & Prof. Code Secs. 1280 and 1282.

Furthermore, no findings were made as to whether Stanford wrongfully demoted, disciplined, threatened and terminated plaintiff for refusal to commit criminal acts on which her statutory rights under the Labor Code Secs. 2856 and 2922, supra, and her contractual rights rested and turned.

Failure to make these key findings, completely predetermined the outcome in favor of Stanford[5].

Judicial review of the arbitration award

1. **The Superior Court** denied plaintiff's petition to vacate the arbitration award and the request for a rehearing by a new arbitrator (A.A 60:23-28 and 63-76; 58-204.), granted Stanford's cross petition (AA 214-226 and 233-255) to confirm the award (App., infra, 15a), and entered judgment that "plaintiff shall take nothing by her complaint." (App., infra, 16a, 17a) The order was unexplained and a requested statement of decision denied.

2. The Judgment by the Court of Appeal for which this Court's Review is sought

The Court of Appeal affirmed the judgment. (App., infra, 1a-7a). The opinion cited Hall v. Superior Court (1993) 18 Cal.App 4th 427,430: "In Moncharsh v. Heily & Blase (1992) 3Cal. 4th 1, the California Supreme Court stated in no uncertain terms that, with limited exceptions, an arbitrator's decision is not reviewable for errors of fact or law."

This overlooked that the California Supreme Court specifically noted in that precedent (Moncharsh v. Heily & Blase at

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[5] The prejudice is evident. If the arbitrator had made the essential findings, and/or not suppressed Stanford's admission that the job was illegal, Stanford would have had to be found legally liable for "firing " plaintiff. I.e., it should have been found (i) that the "Operations Manager" job was illegal, (ii) that this was the only job offered for more than eight months, (iii) that plaintiff could not accept a job that required her to commit criminal acts, that she was forced out against her will by illegal job terms, (iv) that having to quit, involuntarily, by the definition in Turner v. Anheuser-Bush (1994) 7 Cal.4th 1238 was the "legal equivalent to a firing".
In addition, the arbitrator would have had to find, again based on (i) the finding or the admission that the job offered was illegal, (ii) that the employment contract was breached or rendered illegal, (iii) that Stanford was liable for a breach of contract, and (iv) that any subsequent lawful layoff was not possible.

pages 31-32) that arbitration awards where "the entire transaction is illegal" and/or is "inconsistent with the protection of a party's statutory rights", are the exceptions to the general rule and subject to an independent review. And it overlooked that we are dealing here with these very exceptions.

Thus the court's reliance on Hall v. Superior Court and deference to arbitrator's findings[6], which were not warranted by the facts, as noted on page 8-10 above, contravened the principle of stare decisis.

Most relevant in context with the constitutional question of *Due Process of Law*, the standard of review used was completely inadequate to enforce the terms of the "Settlement". That standard was meaningless and could not decide on the merits whether the award complied with the terms of the "Settlement" and/or with California law, or whether the award was void and had to be set aside, as noted above.

The nature of plaintiff's challenges to this arbitration award under the California arbitration laws, Code of Civ. Proc., Sec. 1286.2 subdiv. (d), or subdiv. (e) and Sec. 1283.4, which were also part of the Settlement terms, required the court to follow other lines of binding Supreme Court precedents, each of which dictated independent judicial findings upon the evidence. Namely,

a.) As noted on pages 8-9 above, the award was claimed and shown to be illegal. The California Supreme Court had definitively ruled that issues of illegality were well recognized exceptions from the general rule of deference to arbitrators' decisions, and were subject to independent judicial findings upon the evi-

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[6] "The predicate to her [plaintiff's] causes of action is that Stanford fired her. The arbitrator found as a matter of fact that Stanford did not fire her. There is no judicial review of this finding of disputed fact."

This also overlooked that the underlying, material facts surrounding the job terms and orders are documented and not disputed, that thus the question whether plaintiff "was/was not fired" by illegal job terms was, first and foremost, a question of law subject to de novo determination on appeal.

dence. (Moncharsh v Heily, supra, Black v. Cutter Laboratories (1955) 43C.2d 788; (Loving and Evans v. Blick (1949) 33 Cal.2d, 603; And Franklin v. Nat C. Goldstone Agency (1949) 33 Cal 2d 628; All Points Traders, Inc. v. Barrington Associates (1989) 211 Cal.App.3d 723) and Webb v. District Hospital, 144 Cal.App.3d 946 et al are consistent with that ruling.

b.) Plaintiff claimed and showed the award to violate her statutory rights. This brought the case under the binding decisions of the California Supreme Court in Board of Education v. Round Valley Teachers' Assn. (1996) 13 Cal.4th 269 and Moncharsh,v Heily, supra, which also mandate independent judicial findings to uphold a party's statutory rights.

c.) Since one of the Settlement terms was that the rules of evidence had to be followed, while the award indicated that the rules of evidence had not been followed, this plus the claim that the arbitrator's findings and decision were not supported by competent, substantial evidence, required a de novo review of the evidence as well.

d) Claims and evidence that essential findings had not been made, similarly, required such independent judicial findings or the award had to be set aside, as noted on page 9 above..

Accordingly, and most importantly, both the Settlement terms as well as applicable precedents unequivocally prescribed a standard of review that included independent judicial findings upon the evidence on record. This was the absolute minimum standard, that was adequate to enforce the "Settlement" terms.

In addition, the opinion expressly refused to apply the controlling public policy for health on a ground which does not exist I.e., it held :

> [I]t is not necessary to answer whether Stanford violated public policy by ordering plaintiff to perform assays for which she was not licensed given the finding that plaintiff was not terminated.(App., infra, at 6a, last para)

There is absolutely no evidence on record to support the assumption that "plaintiff was not terminated". To the contrary, it is undisputed that plaintiff was terminated.

III. WHY REVIEW SHOULD BE GRANTED

The issues presented by this case deserve this Court's review because they are at the heart of the constitutional right of *Due Process of Law* and thus of general interest to all who seek redress in state courts, and they can be of profound impact on our democratic society. The specific issues presented in the first segments are primarily to illustrate the broader issues and practical consequences involved here.

1. Inconsistent and directly contrary enforcement of 'state policy' by two arms of the state government defeats the very essence of Due Process of Law

The guaranty of due process demands that "the law shall not be unreasonable, arbitrary or capricious and that the means selected shall have a real and substantial relation to the object sought to be attained." (Nebbia v. New York, 291 U.S. 502, 78 L.Ed.940)

> [i]nconsistency between actions of city official's licensing authorities and police officers constituted violation of due process. (Chalmers v. City of Los Angeles, (1985) 762 F 2d, 753, at 754).

In the latter precedent two contradicting and/or vague city ordinances governing street sales were involved and the due process violation occurred when the vendor was threatened with arrest and prevented from selling her T-shirts.

In the present case, fundamental public policy protecting the public health is involved. This 'state policy' which governs the direction and supervision of clinical laboratories and their performance of medical tests, as noted under the Facts, supra, does not appear unconstitutionally vague, but it was enforced inconsistently.

First, the intervention by the California Department of Health Services, that agency's strict orders that plaintiff comply with the

'state policy', and her compliance with these orders, resulted in the injuries to property, liberty and life, because, her employer, Stanford University, continued to coerce her to perform a job and assignments in contravention of that 'public policy' and retaliated when she refused assignments which, according to the letter of the 'state policy', required her to commit criminal acts, punishable by a jail sentence.

Subsequently, the state courts' refusal to enforce, at all, that very same 'state policy', which was the primary substantive law controlling plaintiff's lawsuit, inflicted fatal prejudice.

For example, plaintiff claimed that the arbitration award was void and had to be vacated because it contravened that 'state policy' and violated her statutory rights under the Cal. Labor Code Sec. 2856 (employee not required to comply with unlawful orders) and Sec. 2922 (employer must not terminate employee by coercion to commit a criminal act), which turned on the employer's violation of that 'state policy'.

At issue here is whether the state courts abrogated plaintiff's constitutional right to relief and denied *procedural due process of law* by their refusal to give effect to that 'state policy', on which all of her claims rested and turned.

The answer should be yes, in that it precluded, a priori, any and every decision on the merits of constitutionally protected claims concerning the enforcement of the Settlement terms, and precluded, a priori, any and every opportunity to assert her constitutional right to relief.

2. Denial of a standard of review adequate to enforce the terms of a "Settlement", which the court forged and entered to enforce, and which involved protected property interests violated Due Process of Law.

> "A state may regulate the procedure of its courts in accordance with its own conception of policy and fairness unless it offends some principle of justice ranked as

fundamental."
(Snyder v. Commonwealth of Massachusetts (201 U.S. 97; Patterson v. New York,(1977) 432 US 197, 201; 53 L Ed 2d 281)

As noted on page 7, the state court was critically and substantially involved in forging the "Settlement"/ arbitration agreement and became a party to it for the purpose to enforce its terms.

Accordingly, the judicial enforcement of the terms of this type of "Settlement" should meet the state action requisite to a due process claim, (Tarkanian, 488 U.S. 179, at 192; L.ed.2d 469 (1988), and the rights under the Settlement should be subject to Due Process protection and scrutiny. (Mullane v. Central Hanover Bank & Trust Co., and Logan v. Zimmerman Brush Co., supra.)

It was under the specified terms of the "Settlement", and only under those terms, as noted above on pages 7and 8, that plaintiff submitted her claims to binding arbitration. Accordingly, when the arbitration award, in no way, complied with the specified terms, plaintiff sought a judicial review to vacate the not-complying award, as noted above on pages 8-11.

Procedural due process to enforce the specific "Settlement" terms absolutely required independent judicial findings upon the evidence with application of the controlling law, which was also the established state standard of review applicable to the challenges of this award, as noted on pages 10-12, supra.

The state courts, however, affirmed the award as judgment without granting a single review that was, at least, meaningful and capable of enforcing the specified Settlement terms, i.e., adequate to decide on the merits of plaintiff's challenges to the award, or that complied with the principle of stare decisis.

As a result, she was deprived of a single fair opportunity to defend her right to vacate an illegal and non complying arbitration award and to obtain a rehearing by a new arbitrator.

At issue is whether the instant judgment arbitrarily deprived plaintiff of all her protected property interests, which she placed under specified terms in a court- created "Settlement", without

being afforded the procedural safeguards required by the *Due Process Clause*.

Petitioner believes that it "does offend a principle of justice" and Due Process of Law when individuals, who have suffered injuries involving life liberty and property, find that their fundamental right to relief for these injuries is abrogated without an adequate and meaningful review.

3. How the Federal Question was presented below.

> "When a state procedure is inadequate, no procedural due process right has been violated unless and until the state refuses to remedy that inadequacy."
> (Zinermon, 494 U.S. at 123, 110 S.Ct. at 983)

In denying a review, the California Supreme Court irreversibly breached the court's contractual obligation to fairly enforce the terms of the "Settlement" and the 'state policy' involved. This breach, plaintiff believes, reached and violated her constitutional right to Due Process, because it actually foreclosed a fair enforcement of the terms in accordance with state law, and irreversibly and arbitrarily erased her rights under the Settlement.

Accordingly, plaintiff's petition for Writ of Review to the California Supreme Court was the first reasonable opportunity to raise the constitutional violation when it occurred or was ripe, and the first opportunity to invoke the protection of the Federal Constitution. That petition challenged the judgment as in excess of jurisdiction and in violation of her Due Process rights under the Fourteenth Amendment to the United States Constitution and Article I of the California Constitution. (App., infra, 22a- 26a).

Its denial without explanation should confer appellate jurisdiction to this Court.

It is a settled doctrine that when a constitutional right or privilege is denied for the first time by an act of the highest state court, which could not be anticipated, then the litigant may challenge this unexpected judicial action by a petition for rehearing. The challenge will be timely to sustain appellate jurisdiction of this

Court over the state court, even if the latter summarily denies the rehearing. (Saunders v. Shaw 244 U.S. 317, 320; 61 L.Ed. 1163, 1165; Missouri ex rel. Missouri Ins. Co v. Gehner, 281 U.S. 313, 320, 74 Led. 870, 875; In Brinkerhoff-Faris Trust & Sav. Co. v Hill (1930) 281 U.S. 673, 681-682; 74 Led. 1107)

In the present case, plaintiff was bound by the "Settlement". Acting under the Covenant of Good Faith she could not anticipate and speculate that the state courts including, ultimately, the California Supreme Court would breach their contractual obligation and fail to enforce both this agreement and the fundamental 'state policy' involved.

Nor could she anticipate that the court would infringe upon her constitutional right to Due Process of Law. The California Supreme Court had the power to remedy 'inadequate procedures' before it gave finality to the judgment.

More specifically, she anticipated that the highest state court would be compelled to grant a review in order to enforce the 'state policy' for health because this arbitration award- judgment (i) manifestly condoned criminal conduct cited by the Department of Health Services (ii) abrogated her substantive rights under Labor Code Secs. 2856 and 2922.and (iii) the opinion by the court of appeal failed to follow the principle of stare decisis in context with the arbitration laws, as noted above on pages 10-12.

Similarly, she anticipated enforcement of the "Settlement" in accordance with its terms, a contract which the court, per se, created, and to which the court, per se, was a party to enforce it.

4. The General Importance of the Issues Presented.

This case calls into question basic principles of Due Process of Law and fundamental fairness which need clarification because they play a central role in adjudications and can have far ranging consequences

California courts should be bound by the Constitution. They are entrusted by law with the solemn duty to execute and enforce, first and foremost, fundamental 'state policies' as well as other parties' contracts, a duty they owe to all Californians.

The Court of Appeal's express holding, that "It is not necessary to answer whether Stanford violated public policy", (App., infra 6a) conflicts in principle with Due Process of Law as well as society's interests and should exceed jurisdiction. If non-enforcement and non-application of the substantive, controlling law(s) of a case became the rule of law of the land, hardly any defendant would be found liable, and the outcome of most, if not all, lawsuits would be automatically predetermined in favor of defendants. The fundamental right to redress for injuries and the guaranty of Due Process of Law, which protects our most fundamental rights, would become an empty, meaningless clause.

In general, when state courts advocate arbitration and use their awesome power under state law to pressure or persuade plaintiffs to submit established, valid legal causes of action, representing interests protected by the Due Process Clause, to private binding arbitration under specified terms, which the courts pledge to enforce, then the courts should be constitutionally required to provide procedures that, at an absolute minimum, are in the spirit of the law and adequate to actually enforce those terms before judgments are entered erasing all the protected rights.

And the more important the rights at stake, the more stringent and strictly enforced should be the procedural safeguards to enforce the agreed upon terms.

Furthermore, the judgment presented for review harms fundamental interests and inherent freedoms of our democratic society. It undermines three lines of statutory public policy and interpreting case law, all of which have been enacted and developed to serve important public interests.

More specifically, it is detrimental and obnoxious to society's interests (a) to plainly <u>not</u> enforce public policy protecting patients undergoing critical medical tests, and rather to condone cited and admitted offenses, (b) not to enforce Secs. 2856 and

2922 of the California Labor Code and allow a powerful employer, like Stanford University, to terminate an employee and destroy a career for refusal to commit criminal acts, rather than uphold the employee's liberty to reject unlawful assignments, and (c) not to enforce Code of Civ. Proc. Secs. 1286.2 and 1283.4 of the California Arbitration Laws in their interpretations by the highest state court, which are specifically to safeguard from arbitrators acting in excess of power and above the law, potentially favoring powerful institutions.

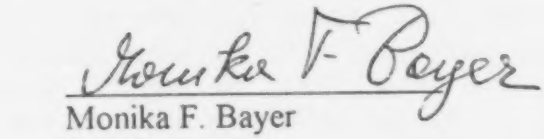
This Court's wisdom and guidance is needed to strike a reasonable balance between the individual litigant's freedom from arbitrary adjudication and society's interests, which in this type of cases go hand in hand, versus the competing discretion of state courts. In other words, to encourage state courts to give meaning to the constitutional right of *Due Process of Law* and afford constitutionally adequate procedures and *fundamental fairness* when these are invoked by citizens seeking redress, not only to help future litigants but all of us who believe in a free and democratic society.

CONCLUSION

The petition for a writ of certiorari should be granted

Respectfully submitted,

Date: March 18, 1998



Monika F. Bayer
931 High Road
Woodside, CA 94062-2326
Tel.: (650) 366-8506
Petitioner (*pro se*)

COPY
NOT CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SIXTH APPELLATE DISTRICT

FILED
JUNE 16 1997
Court of Appeal - Sixth App. Dist.
BY _____
DEPUTY

MONIKA F. BAYER
Plaintiff and Appellant,
vs.

H015777
(Santa Clara County
Super.Ct.No. 723044)

STANFORD UNIVERSITY SCHOOL OF MEDICINE/MEDICAL CENTER, ET AL.,
Defendants and Respondents.
_____/

Plaintiff Monika F. Bayer appeals from a judgment confirming an arbitration award in favor of defendants Stanford University School of Medicine / Medical Center, Stanford University, I.Ross McDougall, and Gary M. Glazer (here-after, collectively, Stanford). She contends here, as she did below, that (1) the arbitrator exceeded her powers (Code Civ. Proc., S 1286.2, subd.(d))1 and (2) she was prejudiced by the arbitrator's failure to make a determination of all necessary questions (S 1286.2, subd.(e).2 We disagree and affirm the judgment.

---

[1] Further statutory references are to the Code of Civil Procedure unless otherwise noted.

[2] The parties proceeded below via cross-petitions, i.e., plaintiff moved to vacate the award and Stanford moved to confirm (continued)

BACKGROUND

In Moncharsh v. Heily & Blase (1992) 3Cal. 4th 1, the California Supreme Court stated in no uncertain terms that, with limited exceptions, an arbitrator's decision is not reviewable for errors of fact or law. (Hall v. Superior Court (1993) 18 Cal.App 4th 427,430.)

Plaintiff sued Stanford for wrongful termination. The litigants partially settled the case by agreeing to binding private arbitration before Barbara A. Caulfield. The arbitrator found the following facts.

---

the award. Stanford also filed an opposition to plaintiff's petition. Plaintiff argued below and argues here that, since she filed her petition first, Stanford was required to file a response rather than a petition. (S 1290.) She also argued below and argues here that Stanford's opposition to her petition, if construed as a response, was untimely because it was not served and filed within 10 days of service of the petition. (S 1290.6.) As such, the allegations of her petition must be deemed admitted (S 1290.) We summarily reject these arguments.

Stanford filed a declaration below from which the trial court could have rationally concluded that the parties had agreed to proceed by cross- motions according to the regular law and motion briefing schedule. Plaintiff makes no argument that the pleading s were untimely according to such an agreement or that the trial court's implicit acceptance of such an agreement was an abuse of discretion.

In any event, that there were cross-petitions is of no moment: the trial court must confirm, correct, or vacate, an award or dismiss the proceedings upon any petition. (S 1286.) And as to untimeliness of the response, the rule requiring that the allegations of the petition be deemed admitted applies only if the petition was "duly served." (S 1290.) Here, Stanford's declaration stated that plaintiff served her petition on Stanford's counsel at an outdated address though the proper address was known. Thus, the trial court could have concluded that the "deemed admitted" rule of section 1290 did not apply because Stanford was not "duly served" with plaintiff's petition.

[Plaintiff] began work as a Life Science Research Assistant in 1976 under the supervision of Dr. Joseph Kriss in the Radioimmunoassay (RIA) Laboratory. During her employment with the lab, [plaintiff] received several promotions, ultimately becoming a Senior Research Scientist in 1984. Research Scientist positions exist to further the research projects of the Principle Investigators (PIs) and such positions are contingent upon the requirements of the PIs. Both the Stanford University Academic Staff Handbook and the letter to [Plaintiff) notifying her of her promotion to Senior Research Scientist state that such positions are dependent upon programmatic need.

Dr. Kriss retired in 1989 and the direction of the research in the lab changed. The demand for (plaintiff's] work as defined by Dr. Kriss's research priorities declined. Both parties .. acknowledge that there was no need for a Senior Research Scientist in the RIA lab after 1989 .. An October 1990 job description completed by [plaintiff's] supervisor referred to [plaintiff] as an Operations Manager rather than as a Senior Research Associate. There is disagreement between the parties as to whether the functions of an Operations Manager coincide with the tasks performed by [plaintiff], but both sides agree that a Research Scientist would perform tasks different from those performed by an Operations Manager. [Plaintiff] viewed the Operations Manager position as a demotion and refused to accept that job. [Plaintiff]was laid off on programmatic grounds effective August 16, 1991 and received three month's salary in lieu of notice and severance pay.

Underlying this employment history is evidence of disagreements in the laboratory between [plaintiff] and her supervisors, especially Dr. McDougall, as well as between [plaintiff] and her staff. [Plaintiff] alleges that Dr. McDougall harassed her and attempted to undermine her credibility with her staff. The evidence does clearly demonstrate that her relationship with Dr. McDougall suffered from lack of bilateral communication.

The problems between [plaintiff] and Dr. McDougall became severe on November 16 and 28 of 1990 when Dr. McDougall asked [plaintiff] to perform RIA assays. A recent inspection of the RIA lab by the California Department of Health and Safety (DHS) found that the lab violated several provisions of the Health and Safety Code. Most importantly, the audit found that the supervisory activities that unlicensed individuals like [plaintiff] were performing violated the law. These citations caused [plaintiff] to question the legality of the assays Dr. McDougall asked her to perform. Dr. McDougall believed that [plaintiff] was allowed to complete the requested tasks based on the opinion given to him by the DHS employee who audited the Stanford Lab. The parties dispute whether [plaintiff] flatly refused to comply with the requests to conduct the assays or merely conditioned her performance of the tasks on first viewing evidence that it was legal for her to do so. At any rate, she did not do the assays and Dr. McDougall suspended her on both occasions, once with pay and once without.

[Plaintiff] filed a grievance with the University on

November 26, 1990 (which was reformatted on February 15, 1991) to protest what she perceived as unfair treatment intended to prompt her resignation. The grievance committee only granted one of [plaintiff's] request: that she be laid off in accordance with University procedures because of lack of need for a Senior Research Scientist which was [plaintiff's] original job description with the University.※

※In fact, [plaintiff] thanked the grievance committee for complying with her wishes in laying her off.※

The arbitrator tried causes of action for constructive discharge, wrongful discharge in violation of public policy, breach of implied contract, and breach of the implied covenant of good faith and fair dealing. She found that plaintiff's causes of action failed at the threshold because Stanford did not fire her but laid her off at her request.

DISCUSSION

Plaintiff first relies upon section 1286.2, subdivision (d). This section states that the trial court shall vacate an arbitration award if it determines that the arbitrator exceeded his or her powers. Plaintiff contends that Arbitrator Caulfield exceeded her powers because the award was contrary to public policy.[3] She reasons that, in requiring her to perform assays,

[3] Relying on Turner v. Anheuser-Bush (1994) 7 Cal.4th 1238 (constructive discharge is a firing), plaintiff also contends that the award was not supported by law and evidence. This claim is patently nonreviewable. (Hall v. Superior Court, supra, 18 Cal.App 4th at p. 430.)

Stanford ordered her to perform illegal acts, acts against public policy.

Plaintiff misses the point. The predicate to her causes of action is that Stanford fired her. The arbitrator found as a matter of fact that Stanford did not fire her. There is no judicial review of this finding of disputed fact.

Plaintiff also relies upon section 1286.2, subdivision (e). This section provides, in pertinent part, that the trial court shall vacate an arbitration award if it determines that the ▪rights of the party were substantially prejudiced by .. conduct of the arbitrators contrary to the provisions of this title.▪ Plaintiff contends that the Arbitrator Caulfield prejudiced her rights by transgressing section 1283.4. This section requires an arbitration award to be in writing and ▪include a determination of all the questions submitted to the arbitrators the decision of which is necessary in order to determine the controversy.▪ She reasons that the award did not determine ▪the issues of violations of public policy, on which [Stanford's] 'legal liability' rested . . . ▪

Again plaintiff misses the point. This is a wrongful termination case. It is not necessary to answer whether Sanford violated public policy by ordering plaintiff to perform assays for which she was not licensed given the finding that plaintiff was not terminated.

DISPOSITION

The judgment is affirmed.

Premo, J

WE CONCUR:

Cottle, P.J

Bamattre-Manoukian, J

BAYER v. STANFORD UNIVERSITY SCHOOL OF MEDICINE/MEDICAL CENTER
No. H015777

IN ARBITRATION PROCEEDINGS

MONIKA BAYER,
Plaintiff

vs.

STANFORD UNIVERSITY, I. ROSS McDOUGALL AND GARY GLAZER
Defendants.

No. 723044
OPINION OF THE ARBITRATOR
BARBARA A CAULFIELD

I. FACTS

Dr. Monika Bayer began work as a Life Science Research Assistant in 1976 under the supervision of Dr. Joseph Kriss in the Radioimmunoassay (RIA) Laboratory. During her employment with the lab, Dr. Bayer received several promotions, ultimately becoming a Senior Research Scientist in 1984. Research Scientist positions exist to further the research projects of the Principle Investigators (PIs) and such positions are contingent upon the requirements of the PIs. Both the Stanford University Academic Staff Handbook and the letter to Dr. Bayer notifying her of her promotion to Senior Research Scientist state that such positions are dependent upon programmatic need.

Dr. Kriss retired in 1989 and the direction of the research in the lab changed. The demand for Dr. Bayer's work as defined by Dr. Kriss's research priorities declined. Both parties to this arbitration acknowledge that there was no need for a Senior Research Scientist in the RIA lab after 1989. See Def. Exh. 154. An October 1990 job description completed

by Dr. Bayer's supervisor referred to Dr. Bayer as an Operations Manager rather than as a Senior Research Associate. There is disagreement between the parties as to whether the functions of an Operations Manager coincide with the tasks performed by Dr. Bayer, but both sides agree that a Research Scientist would perform tasks different from those performed by an Operations Manager. Dr. Bayer viewed the Operations Manager position as a demotion and refused to accept that job. Dr. Bayer was laid off on programmatic grounds effective August 16, 1991 and received three month's salary in lieu of notice and severance pay.

Underlying this employment history is evidence of disagreements in the laboratory between Dr. Bayer and her supervisors, especially Dr. McDougall, as well as between Dr. Bayer and her staff. Dr. Bayer alleges that Dr. McDougall harassed her and attempted to undermine her credibility with her staff. The evidence does clearly demonstrate that her relationship with Dr. McDougall suffered from lack of bilateral communication.

The problems between Dr. Bayer and Dr. McDougall became severe on November 16 and 28 of 1990 when Dr. McDougall asked Dr. Bayer to perform RIA assays. A recent inspection of the RIA lab by the California Department of Health and Safety (DHS) found that the lab violated several provisions of the Health and Safety Code. Most importantly, the audit found that the supervisory activities that unlicensed individuals like Dr. Bayer were performing violated the law. These citations caused Dr. Bayer to question the legality of the assays Dr. McDougall asked her to perform. Dr. McDougall believed that Dr. Bayer was allowed to complete the requested tasks based on the opinion given to him by the DHS employee who audited the Stanford Lab. The parties dispute whether Dr. Bayer flatly refused to comply with the requests to conduct the assays or merely conditioned her performance of the tasks on first viewing evidence that

it was legal for her to do so. At any rate, she did not do the assays and Dr. McDougall suspended her on both occasions, once with pay and once without.

Dr. Bayer filed a grievance with the University on November 26, 1990 (which was reformatted on February 15, 1991) to protest what she perceived as unfair treatment intended to prompt her resignation. The grievance committee only granted one of Dr. Bayer's requests: that she be laid off in accordance with University procedures because of lack of need for a Senior Research Scientist which was Dr. Bayer's original job description with the University.

Dr. Bayer sued Stanford University School of Medicine/ Medical center and Stanford University. The parties agreed to submit the dispute to arbitration, and a total of 247 exhibits were entered by both parties.

II. ANALYSIS

Dr. Bayer alleges that she was the victim of constructive discharge, wrongful discharge breach of implied contract, and breach of the implied covenant of good faith and fair dealing. The defendants' motion to dismiss Dr. Bayer's other claims of retaliation, harassment, and gender and age discrimination was granted on March 28, 1995. [1]

A. Constructive Discharge

Plaintiff fails to demonstrate that she resigned from her job at Stanford's RIA lab. Therefore, her claim for constructive discharge cannot succeed. In circumstances demonstrating constructive discharge,

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[1] In addition to the Stanford University defendants, Dr. I. Ross McDougall and Dr. Gary M. Glazer were named as defendants to these claims that were dismissed.

an employer subjects its employee to such egregious circumstances that a reasonable person would feel that they had no choice but to resign. Turner v. Anheuser-Bush, Inc., 7 Cal.4th 1238, 1251(1994);Soules v. Cadam, 2 Cal. App. 4th 390, 399 (1991), review denied, 1992 Cal. LEXIS 1229 (Cal. Mar. 12, 1992); Valdez v. City of Los Angeles, 231 Cal. App.3d 1043, 1055 (1991). As an initial matter, Dr. Bayer has offered no evidence indicating that she resigned, a prerequisite for a constructive discharge claim. In fact, the exhibits show that Dr. Bayer requested that Stanford lay her off because she acknowledged that the lab no longer needed her to serve in the capacity for which she was hired. Stanford complied with Dr. Bayer's request and laid her off, giving her three months' pay in lieu of notice and severance pay. Dr. Bayer never objected to the lay off or the receipt of compensation. In fact, she thanked the grievance committee for complying with her wishes in laying her off. Def. Exh. 154. Such facts do not indicate that Dr. Bayer resigned.

Even if Dr. Bayer had resigned from her position at Stanford, the facts do not demonstrate the kind of egregious behavior necessary for a constructive discharge claim. The employment environment must be so bad that resigning is the only alternative left to the employee. Turner, 7 Cal. 4th at 1246. Failure to promote, a negative performance evaluation, or a demotion are not enough to create circumstances that can give rise to constructive discharge. See, e.g., Soules, 2 Cal. App. 4th at 401; Valdez, 231 Cal. App. 3d at 1056.

The plaintiff claims that Stanford employees Dr. Gary M. Glazer and especially Dr. McDougall subjected her to poor treatment for over a year in order to force her resignation. She alleges that they: (1) restricted the amount of research she performed in her areas of interest; (2) demoted her to Operations Manager; (3) eliminated her Senior Research

Scientist position without complying with University procedures; (4)misrepresented her interest in a reduced work load; (5) attempted to discredit her with the other employees;(6) planted a falsified performance evaluation in her personnel file; (7) and set up the incidents involving the assays in November 1990 to provide justification for firing her.

Dr. Bayer's allegations about the poor treatment she received in the lab must fail due to a dearth of evidentiary support. While the facts demonstrate poor communication and strained personal relationships between the plaintiff and Drs. Glazer and McDougall, they do not evidence such an unbearable situation that a reasonable employee would feel that she had no alternative but resignation. The facts reveal confusion over Dr. Bayer's role in the lab. An attempt was made to adjust her job description. Both plaintiff and defendants acknowledge that after Dr. Kriss left, no work for Dr. Bayer remained at the RIA lab as a Senior Research Assistant. Stanford followed proper University procedures and laid her off.

Finally even if plaintiff is able to demonstrate constructive discharge, Dr. Bayer still needs to prove the existence of a tort, such as wrongful discharge, or breach of contract. Turner, 7, Cal. 4th 1238. As will be discussed below, Dr. Bayer has not successfully made out a claim for either a tort or a breach of contract.

B. Wrongful Discharge

The plaintiff has failed to make out a wrongful discharge claim. At-will employees who are fired for refusing to violate public policy can bring a tort action alleging wrongful discharge. In order to succeed on a wrongful discharge claim, the public policy at issue must be fundamental, for benefit of the general public rather than the employee or employer, and found in either a statute or a constitutional provision. Turner, 7 Cal. 4th at 1256; see also

Gantt v. Sentry Insurance, 1 Cal. 4th 1083, 1089-95 (1992). Not all laws are considered fundamental; the courts have reserved this status for those involving health, safety and crime prevention. DeSoto v. Yellow Freight Systems, Inc., 957 F.2d 655, 659 (1992)(finding that a firing because an employee refused to disobey a law prohibiting operation of a truck without proper registration papers did not pose a risk to health, safety, or crime prevention to merit finding a wrongful discharge); Foley v. Interactive Data Corp., 47 Cal. 3d 654, 669 (1988) (■[M]any statutes simply regulate conduct between private individuals, or impose requirements whose fulfillment does not implicate fundamental public policy concerns.■).

Even if the regulations and laws governing the operation of laboratories were fundamental, Dr. Bayer's wrongful discharge claim must fail because she cannot prove that Stanford fired her. The evidence clearly indicates that Stanford laid the plaintiff off. Additionally, under Stanford policy as described in the Academic Staff Handbook, Dr. Bayer would not have been entitled to the severance pay and three months pay which she received if she had been fired.

C. Breach of Implied Contract

Dr. Bayer's further claim that Stanford breached its implied employment contract not to discharge an employee except for good cause cannot succeed. The case law establishes that the existence of personnel policies regarding termination, longtime employment, as well as oral assurances of job security can give rise to an implied contract to dismiss only for good cause. See Hoy v. Sears Roebuck & Co., 861 F. Supp. 881 (N.D. Cal.1994); Miller v. Pepsi-Cola Bottling Co., 210 Cal App. 3d 1554 (1989); Newfield v. Insurance Company of the West, 156 Cal App. 3d 440 (1984). With conclusive evidence that she was laid off and no evidence indicating that she was fired,

the existence of an implied contract regarding the terms under which Dr. Bayer can be dismissed is not relevant.

D. Breach of the Implied Covenant of Good Faith and Fair Dealing

Finally, Dr. Bayer's assertion that Stanford violated an implied covenant of good faith and fair dealing cannot succeed. ▪ The implied covenant of good faith and fair dealing requires that the employer act fairly and in good faith.▪ Hoy, 861 F. Supp. 888. In employment termination cases, this covenant requires the employer have good reason for discharging the employee. Id. Dr. Bayer's claim of a breach requires a factual finding that she was fired by Stanford. This fact is not supported by the evidence, and therefore this claim cannot succeed.

III. Conclusion

Dr. Bayer failed to prove her claims of constructive discharge, wrongful discharge, breach of implied contract, and breach of implied contract of good faith and fair dealing. The primary block to all her claims was the overwhelming evidence that she was laid off rather than fired. Therefore Stanford University School of Medicine/ Medical Center and Stanford University are not legally liable to Dr. Bayer for any of the claims asserted.

[signature]

Dated: March 22, 1996

Barbara A. Caulfield

FILED

JUN 11 1996

STEPHEN V. LOVE
County Clerk
Santa Clara County
BY _____ DEPUTY

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF SANTA CLARA

MONIKA BAYER,

Plaintiff,

vs.

STANFORD UNIVERSITY SCHOOL OF MEDICINE/MEDICAL CENTER, et al.,

Defendants.

Case No. 723044

ORDER

The above matter was heard on June 4, 1996 in Department 17 before the Honorable Peter G. Stone, presiding. The matter having been reviewed under submission, the Court orders as follows:

The petition to Confirm filed by Defendants is granted. The Petition to Vacate filed by Plaintiff is denied.

DATED: _____

JUN 11 1996

PETER G. STONE
Judge of the Superior Court

12ps57/vs

condensed version of original

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Attorneys for Defendants
The Board of Trustees of The Leland Stanford Junior University, I. Ross McDougall and Gary M. Glazer

COPY

(ENDORSED)
FILED
JUN 24 1996
STEPHEN V. LOVE
County Clerk
Santa Clara County
BY _____ DEPUTY

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SANTA CLARA

MONIKA BAYER,

Plaintiff,

v.

STANFORD UNIVERSITY SCHOOL OF MEDICINE/MEDICAL CENTER; STANFORD UNIVERSITY; I. ROSS MCDOUGALL, and GARY M. GLAZER; and DOES 1 through 20, inclusive,,

Defendant.

No. 723044

JUDGMENT

Dept.: 17

FILED UNDER SEAL PURSUANT TO MAY 14, 1996 ORDER OF HONORABLE PETER STONE

THIS MATTER HAVING BEEN REFERRED to binding arbitration and the Opinion of the Arbitrator, Barbara Caulfield, having been signed and served on March 22, 1996, attached hereto as Exhibit A, and

THIS COURT HAVING CONFIRMED the arbitration award in this matter, by order dated June 11, 1996, attached hereto as Exhibit B, and

PURSUANT TO Code of Civil Procedure § 1287.4, providing that, "if an award is confirmed, judgment shall be entered in conformity therewith,"

IT IS HEREBY ORDERED THAT judgment in this matter is entered in favor of defendants and against plaintiff and that plaintiff shall take nothing by her Complaint.

DATED :

6/19/96

[SIGNATURE]

JUDGE OF THE SUPERIOR COURT
Peter G. Stone

COPY

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNI.

SIXTH APPELLATE DISTRICT

FILED

JUL 8 - 1997

Court of Appeal - Sixth App. Dist.

BY _____ DEPUTY

MONIKA F. BAYER,
Plaintiff and Appellant,

v.

STANFORD UNIV. SCHOOL OF MEDICINE, et al.,
Defendants and Respondents.

No. H015777

(Super. Ct. No. 723044)
Santa Clara County

BY THE COURT*:

Appellant's petition for rehearing is denied.

Dated JUL 8 - 1997

COTTLE, P.J.

P.J.

*Before Cottle, P.J., Premo, J., Bamattre-Manoukian, J.

condensed version of original

Sixth Appellate District No. H015777
S063083

IN THE SUPREME COURT OF CALIFORNIA

SUPREME COURT
FILED
SEP 17 1997
Robert Wandruff Clerk
A. CRUZ
DEPUTY

MONIKA F. BAYER, Appellant

v.

STANFORD UNIVERSITY SCHOOL OF MEDICINE,
Etc. Et Al., Respondents

Petition for review DENIED.

MOSK

Acting Chief Justice

condensed version of original

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

COPY

Hartford, John J.
2000 Broadway, Suite 236
P. O. Box 1207
Redwood City, CA 94064

BAYER, MONIKA F.
vs.
STANFORD UNIV. SCHOOL OF MEDICINE, ET AL
H015777
Santa Clara County No. 723044

* * REMITTITUR * *

I, MICHAEL J. YERLY, Clerk of the Court of Appeal of the State of California, for the Sixth Appellate District, do hereby certify that the opinion or decision entered in the above-entitled cause on June 16, 1997 has now become final.

____Appellant ✓ Respondent to recover costs
____Each party to bear own costs
____Costs are not awarded in this proceeding
____See decision for costs determination

Witness my hand and the seal of the Court affixed at my office

SEP 23 1997

SEAL

MICHAEL J. YERLY, Clerk

J. F. VARIZE

By: Deputy

S065856

IN THE SUPREME COURT OF CALIFORNIA

SUPREME COURT
FILED

DEC 23 1997

Robert Wandruff Clerk

DEPUTY

MONIKA F. BAYER, Petitioner

v.

COURT OF APPEAL SIXTH APPELLATE DISTRICT, Respondent
STANFORD UNIVERSITY SCHOOL OF MEDICINE Et Al., Real Parties In Interest

Petition for writ of review DENIED.

George
Chief Justice

condensed version of original

CIVIL NO. _____

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

BAYER, MONIKA F.
Petitioner
vs.

THE COURT OF APPEAL SIXTH DISTRICT
FOR THE STATE OF CALIFORNIA
Respondent

STANFORD UNIVERSITY SCHOOL OF MEDICINE/
MEDICAL CENTER; STANFORD UNIVERSITY;
I. ROSS MCDOUGALL and GARY M. GLAZER;
and DOES 1 through 20, inclusive
Real Party in Interest
_____/

SUPREME COURT
FILED
NOV 17 1997
Robert Wa..druff Clerk
H. CROZ
DEPUTY

After a decision by the Court of Appeal,
Sixth Appellate District Case No. H015777
(Santa Clara County Superior Court, Case No. 723044
The Honorable Peter G. Stone, Judge)

PETITION FOR WRIT OF REVIEW

[CCP SEC. 1069; CAL. RULES OF CT., RULE 56 (a)]

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Petitioner/ Appellant and Plaintiff in propria persona

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C. THE JUDGMENT EXCEEDED THE JURISDICTION OF THE COURT BECAUSE IT IS VIOLATIVE OF *DUE PROCESS OF LAW*

Code Civ.Proc. Sec. 410.10 provides:

> A court of this state may exercise jurisdiction on any basis not inconsistent with the Constitution of this state or of the United States.

See also **Estate of Bodger** [1954] 128 Cal App2d 710, 276) and **Abelleira v. District Court of Appeal,** supra.

In **Chalmers v. City of Los Angeles,** ([1985] 762 F 2d, 753, at 754) a U.S. Court of Appeals held:

> inconsistency between actions of city official's licensing authorities and police officers constituted violation of due process.

In this case, inconsistent enforcement of express statutory public policy governing the operation of clinical laboratories by, on one hand, the Calif. Department of Health Services, a state agency, and on the other hand, the state courts, failed to afford plaintiff due process of law guaranteed by the U.S. Const., Amend XIV, and the Calif. Const, Art I.

More specifically, this case involves the loss of inalienable rights, property, liberty and probably life. Plaintiff lost her ※continuing Senior Research Scientist※ position, her entire career as a scientist, or the liberty to pursue her profession. Worst, plaintiff's husband died suddenly when documents secretly and falsely blackballing plaintiff were discovered.

Plaintiff's husband and she were terribly harmed for no other reason than that she obeyed California Law Related to Clinical Laboratories, as enforced by the Calif. Department of Health Services, while Stanford, her employer, tried to coerce her to

perform illegal job responsibilities and punished her when she refused to commit criminal acts.(Verified Facts, Exh.J(146-148), Exh. E (138); Exh. F (139), Exh. O (167) and Exh. P (168); Exh. G (140). Had she not complied with the law, she could have faced a jail sentence.

At stake in this lawsuit is relief for these losses.

Plaintiff's lawsuit involves a ※Confidential Settlement※ brokered by the court (Court transcript Exh. 3 (36-43) This ※Settlement※ included, inter alia, the parties' consent to submit to private binding arbitration, as distinguished from a private arbitration agreement.

More specifically, the Superior Court judge with jurisdiction over the parties and this lawsuit, and bringing to bear his authority under California law, was instrumental in forging the ※Confidential Settlement※ [5]

Importantly, the court also became a party to the ※Settlement※, specifically for the purpose to enforce it (Exh. 3 at 40: 13-15 and 42: 4-10)

The terms of the ※Settlement※ included that the arbitrator was required to apply the Rules of Evidence, (Exh. 3 at. 40:12) and **Code Civ. Proc., 1280 et seq.**, the Calif. Arbitration Laws, were applicable. (Exh. 3 at 41:13-15). Subsequently, it was agreed to bifurcate the arbitration proceeding and that the arbitrator was required to render a decision on ※legal liability in adherence to the rule of law※ .

Plaintiff understood and trusted that these terms, like those of other contracts where major interests are at stake, were binding on all parties, including the arbitrator. And, that the courts

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[5] Plaintiff was not privy to participate in the negotiations but was advised by her counsel and his colleague that the court had "worked hard", that, in essence, she could not say no to the judge who would preside over the trial, and that she had to relinquish her trial date.

would indeed enforce them in accordance with California law.

The arbitration award (Exh. 7 (50-57)) very clearly failed to comply with the ※Settlement※ terms. See Point A. at 12, supra.

Although the arbitrator, a private party, has taken the decisive step that caused the harm to the plaintiff, the court's critical participation in bringing about the ※Settlement※, and the court's promise to enforce it, should constitute sufficient state action to render the ※Settlement※ terms constitutionally protected property interest(s) or rights by the standard described by the Supreme Court in **Tarkanian,** 488 U.S. at 192.

Further, the judicial proceedings related to the enforcement of the ※Settlement※ terms, (i.e., the decisions to confirm/ vacate the arbitration award plus the appeals from the arbitration judgment pursuant to Chapters 4 and 5 of the Calif. Arbitration Laws), in their entirety, should be subject to due process of law.

Substantive Due Process of Law, under the facts of this case, (Verified Facts herein) required the courts, as an absolute minimum, to act upon the evidence and to apply and enforce the statutory public policy governing clinical laboratories. Because it was the enforcement of these laws by DHS, and it was the compliance with these laws by plaintiff, that triggered her wrongful demotion, accusations of insubordination, disciplinary actions and caused gravest harm.

Procedural Due Process with respect to enforcement of the specific ※Settlement※ terms required also, as the minimum procedure, a de novo review of the evidence and judicial findings applying the controlling statutes.

First, because that is the established standard of review for arbitration awards involving issues of illegality. (**Moncharsh v Heily,** (1992), 3 Cal.4th 1 , at 31); **Black v. Cutter Laboratories** (1955) 43C.2d 788; (**Loving and Evans v. Blick** (1949) 33 Cal.2d, 603; **Franklin v. Nat C. Goldstone Agency** (1949) 33 Cal 2d 628; **All Points Traders, Inc. v.**

Barrington Associates (1989) 211 Cal.App.3d 723), (Webb v. District Hospital, 144 Cal.App.3d 946);

Second, because that is the minimum procedure due in order to enforce the "Settlement" and the terms under it. In other words, without this minimum procedure, the terms were meaningless. Plaintiff did not have the slightest chance to carry the burden of proof and prove that the arbitration award was illegal, did not comply with the terms and had to be vacated.

Plaintiff requested repeatedly an independent judicial review and findings.

The Superior court confirmed the arbitration award without a statement of decision to evidence independent review or findings. (Exh. 27)

The decision by the Court of Appeal (attached here as Exh. 1) cited Hall v Superior Court (1993) 18Cal.App.4th 427, which has nothing to do with illegality. It expressly rejected an independent review, thus denied plaintiff procedural due process of law.

Most importantly, the Court of Appeal expressly refused to execute and enforce the statutory public policy regulating clinical laboratories, on the ground that "it was not necessary" to do so. In other words, it arbitrarily affirmed the judgment "plaintiff shall take nothing by her complaint"

This enforcement, or lack thereof, is in sharp contrast to the action by the Calif. Department of Health Services, which did enforce the statutes and told plaintiff she must not perform responsibilities she was not authorized to perform under Calif. laws, (Exh. D), which triggered the events that caused terrible harm.

This inconsistent enforcement of statutory public policy denied plaintiff substantive due process of law.

In denying constitutional due process of law and arbitrarily affirming the arbitration judgment, the court exceeded its jurisdiction.